(2)

No. 99-719

Supreme Court, U.S.
FILED
NOV 22 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RICHARD A. FREDERICK, RANDOLPH W. LENZ, KARIN LENZ AND KCS INDUSTRIES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

L. HAROLD LEVINSON*
Vanderbilt University Law School
131 21st Avenue South
Nashville, TN 37203
(615) 322-2540

PHILIP D. BRENT
PHILIP D. BRENT, PROFESSIONAL CORPORATION
15915 Ventura Blvd., Suite 203
Encino, CA 91436
(818) 990-2444

Attorneys for Amicus Curiae, American Association of Attorney-Certified Public Accountants, Inc.

**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

168

Silvia S. Ibanez
Silvia S. Ibanez Law Office
3956 Town Center Blvd.
Suite 196
Orlando, FL 32837
(407) 856-9449

Thomas W. McCulloch
Thomas W. McCulloch, LLC
2810 Summit Tower
Eleven Greenway Plaza
Houston, TX 77046
(713) 961-1099

David Ostrove
Ostrove, Krantz & Ostrove
A Professional Corporation
5757 Wilshire Blvd.
Suite 535
Los Angeles, CA 90036
(323) 939-3400

C. Murray Saylor, Jr.
The Saylor Law Firm LLP
100 Colony Square
Suite 1224
1175 Peachtree Street, N.E.
Atlanta, GA 30361
404/892-4400

Sydney S. Traum
Sydney S. Traum, P.A.
Zack Kosnitzky, P.A.
100 S.E. 2nd Street
Suite 2800
Miami, FL 33131
(305) 539-8400

TABLE OF CONTENTS

Page

Table of Authorities iii

Consent of the Parties 1

Interest of Amicus Curiae 1

Summary of Argument 2

Argument 2

I. The Court of Appeals erred in denying the attorney-client and work product privileges to "accountant's work" performed by a lawyer ... 2

A. The Court of Appeals' distinction between "accountant's work" and "lawyer's work" is inappropriate and unnecessary 3

1. The court's distinction is inappropriate... 4

2. The court's distinction is unnecessary.. 5

B. The Court of Appeals improperly considered competition between lawyers and accountants as a factor in its denial of the privileges to "accountant's work" performed by a lawyer 5

C. The Court of Appeals' decision needlessly complicates the practice of law and discourages candid communications between lawyers and clients 6

D. The Court of Appeals' decision may discourage lawyers from acquiring or using knowledge or skills in non-law areas 7

TABLE OF CONTENTS – Continued

Page

II. The Court of Appeals should have applied the privileges to all professional services performed by a lawyer for a client, without regard to whether similar types of services may also be performed by non-lawyers 8

A. The approach proposed in this brief is consistent with the common law 8

B. The approach proposed in this brief protects the reasonable expectations of clients and will encourage candid communication between lawyers and clients 10

C. The approach proposed in this brief protects the interests of the government and other parties seeking access to information 11

D. The approach proposed in this brief promotes the public interest in the broad education of lawyers and in their appropriate use of non-law knowledge and skills for the benefit of clients 12

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES:

Colton v. United States, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963) 4

United States v. Abrahams, 905 F.2d 1276 (9th Cir. 1990) 4

United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) 4

RULES:

Internal Revenue Service, Rules of Practice, 31 CFR Part 10 (1998) 11

Internal Revenue Service, Rules of Practice, 31 CFR § 10.29 (1998) 11

OTHER AUTHORITIES:

Restatement of the Law Governing Lawyers, Proposed Final Draft No. 1 (March 29, 1996) ... 8, 10, 11

C. Murray Saylor, Jr., *Privilege and Tax Return Preparation*, 35 The Attorney-CPA, No. 2 (1999) at 7. 4

Charles W. Wolfram, Modern Legal Ethics (1986) ... 10, 11

CONSENT OF THE PARTIES

All parties have consented to the participation of the American Association of Attorney-Certified Public Accountants, Inc. in these proceedings as amicus curiae in support of the petition for writ of certiorari. Their consents have been filed with this Court.[1]

INTEREST OF AMICUS CURIAE

The American Association of Attorney-Certified Public Accountants, Inc. ("AAA-CPA" or "the Association") is a not-for-profit corporation, formed in 1964 and now headquartered in California, with members located all over the United States. Every member has been licensed as both an attorney and a certified public accountant.

AAA-CPA is dedicated to ensuring that its members observe the highest professional and ethical standards in service to their clients and the public. At the same time, AAA-CPA supports the right of practitioners to disclose truthful information about their qualifications, and to engage in the practice of either or both of their professions. The Association has filed amicus curiae briefs in other cases before this Court involving the regulation of individuals who are licensed in one or more professions.

AAA-CPA is in a unique position to evaluate the distinction made by the Court of Appeals for the Seventh

---

[1] None of the counsel for the parties authored this brief in whole or in part. No person or entity, other than the amicus curiae, its members or its counsel, made any monetary contribution to the preparation or submission of this brief.

Circuit in this case, between "lawyer's work" (to which the court applies the attorney-client and work product privileges) and "accountant's work" (to which the court does not apply the privileges even when this work is performed by a lawyer).

In this brief, AAA-CPA respectfully submits to this Court a proposed approach to the resolution of this case. The Association supports the petitioners in their request for writ of certiorari.

SUMMARY OF ARGUMENT

I. THE COURT OF APPEALS ERRED IN DENYING THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES TO "ACCOUNTANT'S WORK" PERFORMED BY A LAWYER.

II. THE COURT OF APPEALS SHOULD HAVE APPLIED THE PRIVILEGES TO ALL PROFESSIONAL SERVICES PERFORMED BY A LAWYER FOR A CLIENT, WITHOUT REGARD TO WHETHER SIMILAR TYPES OF SERVICES MAY ALSO BE PERFORMED BY NON-LAWYERS.

ARGUMENT

I. The Court of Appeals erred in denying the attorney-client and work product privileges to "accountant's work" performed by a lawyer

The Court of Appeals applied the attorney-client and work product privileges to "lawyer's work," but not to

"accountant's work" even when the "accountant's work" is performed by a lawyer.

A. The Court of Appeals' distinction between "accountant's work" and "lawyer's work" is inappropriate and unnecessary

The court did not define "accountant's work," but the court's opinion implies the term means the type of service customarily performed by acccuntants. The court denied the privileges to the following types of "accountant's work," even when performed by a lawyer:

> preparation of tax returns and related worksheets;
>
> preparation of draft tax returns and related worksheets;
>
> "dual-purpose documents" prepared for use both in tax returns and in litigation with the Internal Revenue Service ("IRS") – the court indicated that the unprivileged nature of the "accountant's work" of preparing tax returns destroys the privileges which would otherwise apply to the "lawyer's work" of preparing for litigation.

In addition, the court used the concept of "accountant's work" to deny the privileges to some types of documents prepared in connection with IRS audits of tax returns. In this category, the court characterized documents as "accountant's work" (and therefore unprivileged) if prepared merely to verify the accuracy of the return. In contrast, the court characterized documents as "lawyer's work" (and therefore privileged) if prepared

to enable the lawyer to deal with areas of statutory interpretation or case law that the revenue agent may have raised during the audit of a tax return.

1. The court's distinction is inappropriate

The court's distinction between "accountant's work" and "lawyer's work" is inappropriate for the following reasons:

First, the court does not offer any information or authority to support this distinction, which conflicts with precedents of other circuits, such as *United States v. Abrahams*, 905 F.2d 1276, 1284 (9th Cir. 1990); *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States v. Kovel*, 296 F.2d 918, 922-23 (2d Cir. 1961). The court does not mention these precedents, nor does the court explain the need to reject them. Further, the court does not address the related theory that tax return preparation may be the practice of law, even though non-lawyers are allowed to perform it. This theory notes that tax preparation necessarily requires interpretation of the tax laws as applied to the taxpayer's facts. Interpretation of statutes is an integral part of the practice of law. The interpretation of the tax law, together with reporting to the IRS and defending what has been reported, is given special prominence in legal education at the J.D. and LL.M. levels, in bar examinations, and in continuing legal education programs. *See* C. Murray Saylor, Jr., *Privilege and Tax Return Preparation*, 35 The Attorney-CPA, No. 2 (1999) at 7.

Second, the court fails to recognize the significant overlap between the services customarily performed by accountants and by lawyers. In practice, many tax returns are prepared by accountants, while others are prepared by lawyers, still others are prepared by teams including members of each profession, and some are prepared by individuals who are neither lawyers nor accountants. The preparation of tax returns, therefore, is not the exclusive province of either profession.

2. The court's distinction is unnecessary

The court's distinction between "accountant's work" and "lawyer's work" is unnecessary to the decision of this case. As suggested later in this brief, the crucial issue is whether the clients retained the lawyer to render professional services in a lawyer-client relationship. The proper resolution of this issue does not depend on whether non-lawyers may also render similar services to their clients.

B. The Court of Appeals improperly considered competition between lawyers and accountants as a factor in its denial of the privileges to "accountant's work" performed by a lawyer

The court based its decision, in substantial part, on the proposition that lawyers would receive an inappropriate competitive advantage over accountants if the privileges applied to "accountant's work" when performed by lawyers. The court offered no support for this proposition.

The issue of inter-professional competition is complex, and involves comparisons based on such factors as type of service, expertise, regulatory regime, and public perceptions. Without a comprehensive study of all relevant factors, the court acted improperly by basing its decision, in part, on its unexplained perception of the impact of its decision on competition between accountants and lawyers.

C. The Court of Appeals' decision needlessly complicates the practice of law and discourages candid communications between lawyers and clients

The court's decision, if allowed to stand, will create a precedent which needlessly complicates the practice of law. Lawyers in tax practice will have to do their best to distinguish unprivileged "accountant's work" from privileged "lawyer's work." On the basis of this distinction, lawyers will be well advised to inform clients of the limitations of the privileges, to place limits on communications with clients, and to consider adopting special records retention systems regarding unprivileged material.

The precedent will, in addition, affect virtually all lawyers, since it is almost inevitable that a lawyer has some type of knowledge or skills beyond the traditional scope of the law. Lawyers generally acquire extensive non-law knowledge and skills during their undergraduate studies before law school. Many law school courses include coverage of non-law disciplines, as do many continuing legal education programs. Many lawyers possess

non-law knowledge and skills in areas such as foreign languages, engineering, literature, medicine, investments, accounting and economics.

The court's decision threatens to destroy the privileges whenever a lawyer uses non-law knowledge and skills while serving in an attorney-client relationship.

D. The Court of Appeals' decision may discourage lawyers from acquiring or using knowledge or skills in non-law areas

Lawyers may reduce their attempts to acquire non-law knowledge and skills, if their use of such knowledge or skills in the practice of law will result in loss of the lawyer-client and work product privileges. This result would be contrary to the public interest in a broadly educated legal profession.

Further, lawyers may be discouraged from using their existing non-law knowledge and skills in the representation of clients, if this use would destroy the privileges. This result would be contrary to the interest of clients in many areas of practice in which non-law knowledge and skills may be useful, such as tax, patent, copyright, domestic relations, commercial law, professional liability, and many other areas of practice.

II. The Court of Appeals should have applied the privileges to all professional services performed by a lawyer for a client, without regard to whether similar types of services may also be performed by non-lawyers

Instead of basing its decision on the difference between "accountant's work" and "lawyer's work," the court should have applied the privileges to all professional services performed by a lawyer for a client, without regard to whether similar types of services may also be performed by non-lawyers.

A. The approach proposed in this brief is consistent with the common law

The approach suggested here is consistent with the common law, as reflected in the Restatement of the Law Governing Lawyers, Proposed Final Draft No. 1 (March 29, 1996) ("Restatement"). The Restatement deals with the situation where "a lawyer's services are of a kind performed commonly by both lawyers and non-lawyers or that otherwise include both legal and non-legal elements." § 122, cmt. c. This comment concludes:

> So long as the client consults to gain advantage from the lawyer's legal skills and training, the communication is within this Section [and therefore privileged], even if the client may expect to gain other benefits as well, such as business advice or the comfort of friendship. The primary consideration is the reasonable expectations of the person in the position of the putative client.

The same comment offers two illustrations of this principle in the context of tax practice. In the first, the

lawyer prepares a client's tax return which is not complex, and does not require a knowledge of tax law beyond that possessed by non-lawyer tax preparers. Neither the client nor the lawyer discusses any legal questions. The lawyer charges a fee comparable to the amount charged by non-lawyer tax preparers. In this situation, "[t]he trier of fact may, but need not, infer that the Client's purpose was not that of obtaining legal assistance." The Reporter's Notes to this illustration observe that "The decisions disagree whether routine tax-return preparation services constitute legal services covered by the privilege."

In the next illustration in the Restatement:

> Client has frequently consulted Lawyer about legal matters relating to Client's growing business. Lawyer drafts documents and provides other legal assistance relating to a complicated transaction having important tax implications that Client and Lawyer identify and discuss. Client later asks Lawyer to prepare Client's tax return for the year in which the transaction occurs. The circumstances indicate that Lawyer is providing legal services in preparing the tax return.

These illustrations suggest there is a continuum of tax services, ranging from the preparation of routine returns to tax services in more complex settings. The degree of complexity does not, of itself, determine whether preparation of the return is "lawyer's work" or not. Rather, the degree of complexity indicates the expectation of the client when obtaining the service. The more complex the situation, the more likely it is that the client expects to enter into an attorney-client relationship with the lawyer who performs the services. The facts of the

instant case indicate clearly that the petitioner clients retained the petitioner lawyer because they wanted legal services in a complex combination of tax returns and IRS audits.

The approach suggested in this brief would not change the common-law exceptions to the privileges. For example, the scrivener's exception would still apply, Restatement § 122, cmt. c, because the client could not reasonably expect to enter into an attorney-client relationship if the lawyer merely acted as a public stenographer. Also, the exception for lawyers while functioning as corporate directors and officers would still apply, *see* Charles W. Wolfram, Modern Legal Ethics 739-40 (1986), because lawyers who perform these functions act in a separate role of director or officer, rather than as attorney for the corporate client. Therefore, the corporate client could not reasonably expect the attorney-client relationship to extend to the lawyer's performance of duties as director or officer.

B. The approach proposed in this brief protects the reasonable expectations of clients and will encourage candid communication between lawyers and clients

The approach suggested here protects the reasonable expectations of clients. When a client enters into an attorney-client relationship, the client may reasonably rely on the lawyer's knowledge and skill, and also on the regulatory system that governs the conduct of lawyers. That system, administered by the states, applies to lawyers in all types of practice, unless superseded by other law.

Thus a lawyer in federal tax practice is governed by the rules of professional conduct of the applicable state, as well as by the Internal Revenue Service ("IRS") Rules of Practice, 31 CFR Part 10 (1998), which govern tax practitioners in general. For example, the IRS rules prohibit conflicts of interest, but imply that all conflicts are waivable, 31 CFR § 10.29. In contrast, the lawyers' rules of professional conduct make some conflicts non-waivable; *see* Charles W. Wolfram, Modern Legal Ethics 341-43 (1986). A client who retains a lawyer for tax services may rely on the more comprehensive protection provided by the lawyers' rules of professional conduct. Similarly, this client should be able to rely on the privileges which have been traditionally associated with the attorney-client relationship. If the client cannot rely on these privileges, candid communication between lawyer and client may be chilled.

C. The approach proposed in this brief protects the interests of the government and other parties seeking access to information

The IRS and other parties who seek access to information are protected by the approach proposed in this brief. The IRS is protected by its ability, in appropriate cases, to issue subpoenas to the taxpayer, to decide factual issues adversely to the taxpayer for lack of evidence, and to invoke the crime-fraud exception to the attorney-client privilege, Restatement § 132, and to the work product privilege, Restatement § 142. Other parties who seek access to information have similar protection.

D. The approach proposed in this brief promotes the public interest in the broad education of lawyers and in their appropriate use of non-law knowledge and skills for the benefit of clients

The approach suggested in this brief allows lawyers to broaden their education by acquiring non-law knowledge and skills, and to use such knowledge and skills appropriately for the benefit of clients, without jeopardizing the attorney-client and work product privileges. The public interest is served by a broadly educated legal profession.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

L. HAROLD LEVINSON *
Vanderbilt University Law School
131 21st Avenue South
Nashville, TN 37203
(615) 322-2540

* *Counsel of Record*

PHILIP D. BRENT
PHILIP D. BRENT, PROFESSIONAL CORPORATION
15915 Ventura Blvd., Suite 203
Encino, CA 91436
(818) 990-2444

SILVIA S. IBANEZ
SILVIA S. IBANEZ LAW OFFICE
3956 Town Center Blvd., Suite 196
Orlando, FL 32837
(407) 856-9449

THOMAS W. MCCULLOCH
THOMAS W. MCCULLOCH, LLC
2810 Summit Tower
Eleven Greenway Plaza
Houston, TX 77046
(713) 961-1099

DAVID OSTROVE
OSTROVE, KRANTZ & OSTROVE, A PROFESSIONAL CORPORATION
5757 Wilshire Blvd., Suite 535
Los Angeles, CA 90036
(323) 939-3400

C. MURRAY SAYLOR, JR.
THE SAYLOR LAW FIRM LLP
100 Colony Square, Suite 1224
1175 Peachtree Street, N.E.
Atlanta, GA 30361
(404) 892-4400

SYDNEY S. TRAUM
SYDNEY S. TRAUM, P.A.
ZACK KOSNITZKY, P.A.
100 S.E. 2nd Street, Suite 2800
Miami, FL 33131
(305) 539-8400

Attorneys for Amicus Curiae, American Association of Attorney-Certified Public Accountants, Inc.

November 22, 1999